RECORD AND BRIEFS

No. 10-1270

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARRETT DOTCH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RANDALL S. SUSSKIND
EQUAL JUSTICE INITIATIVE
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

SETH A. TUCKER
Counsel of Record
JOSEPH ZAMBUTO, JR.
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
stucker@cov.com

Counsel for Petitioner

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INTRODUCTION

It is striking (and very telling) how little the State has chosen to say about the actual merits of Mr. Dotch's request for certiorari. The State cannot dispute that there is a split of authority among seven state supreme courts on the question presented[1] and so instead the State attempts to divert this Court's focus to procedural issues and exceptions that supposedly render Mr. Dotch's case the wrong vehicle for resolving the split. As discussed below, however, none of the State's arguments has any merit.

[1] The best response the State can muster is that Mr. Dotch may have "exaggerated" the split. Resp't Br. at 8-9. Not so. The opinions of the lower courts speak for themselves.

Mr. Dotch's case is an ideal vehicle for resolving a clear split of authority concerning the nature of the jury's role in capital sentencing. The rights in question are fundamental, and the stakes could not be higher. By its silence, the State essentially concedes its inability to contest these propositions.

Mr. Dotch's sentence of death would be held unconstitutional in at least four States, yet has been permitted by Alabama. This conflict in the lower courts cries out for resolution.

Because the State has not engaged on the larger issues, in the remainder of this reply brief we will demonstrate that the State is wrong when it contends that Mr. Dotch's case does not squarely present the *Apprendi/Ring* issue that has bedeviled the lower courts.

I. MR. DOTCH'S CLAIM WAS PROPERLY RAISED AND PRESERVED BELOW.

The State argues in its opposition brief that Mr. Dotch's claim was not raised and preserved in the lower courts. *See* Resp't Br. at 9-12. This contention is without merit. Mr. Dotch has maintained at every stage of his trial and appellate proceedings that Alabama's hybrid death penalty sentencing scheme violates *Apprendi* and *Ring* because it allows the trial judge, not the jury, to find and weigh facts which are necessary to support a death sentence.

Before his trial, Mr. Dotch moved to bar imposition of the death penalty on the ground that Alabama's sentencing scheme "permits the judge, not the jury, to make the factual findings necessary to expose the defendant to the death penalty," in violation of "the Sixth, Eighth and Fourteenth Amendments to the

United States Constitution." (C.R. 251).[2] In support of the motion, Mr. Dotch specifically argued (among other things) that:

> 14. The determination of whether the aggravating circumstances(s) exist beyond a reasonable doub[t] *and* whether the aggravating circumstance(s) outweighs the mitigating circumstance(s) are findings of "fact on which the legislature conditions an increase in [the] maximum punishment," and as such must be found to exist by a unanimous jury beyond a reasonable doubt. *Ring*, 122 S. Ct. at 2432.
>
> 15. Only the judge makes these factual findings under the current Alabama [death penalty] statute; therefore, the statute is unconstitutional.

(C.R. 256) (emphasis in original). Following his conviction and sentence, Mr. Dotch moved for a new trial on the ground that:

> The Alabama capital sentencing scheme is unconstitutional under *Ring v. Arizona*, specifically in that it does not require the jury to find unanimously the facts supporting a capital sentence.

Pet'r App. at 175a.

In support of his *Apprendi/Ring* claim before the Alabama Court of Criminal Appeals, Mr. Dotch argued that:

> In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court held that facts necessary to sentence a defendant to death must be found by

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[2] The abbreviation "C.R ___" refers to the clerk's record on direct appeal.

> the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. . . .
>
> Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and fails constitutional muster for the same reasons.

Resp't App. at 1a (internal citations omitted). Mr. Dotch repeated these contentions in support of his application for rehearing before the Court of Criminal Appeals (Resp't App. at 4a-5a), and in his petition to the Supreme Court of Alabama for a writ of certiorari (Resp't App. at 6a).

Given the record, the notion that Mr. Dotch failed to preserve his claim is meritless. To be sure, Mr. Dotch's instant petition further elaborates on the reasons why Alabama's hybrid sentencing scheme cannot be squared with *Apprendi* and *Ring*. But this Court's precedents make clear that a petitioner may offer any argument – even a new one – in support of a valid claim. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (internal references omitted); *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (same); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899).

In contending otherwise, the State incorrectly conflates "arguments" with "claims." *See Yee*, 503 U.S. at 534-35. Mr. Dotch's petition is based on the same

claim he has been making since before his conviction and death sentence, *i.e.*, that Alabama's sentencing scheme unconstitutionally usurps the fact-finding role of the jury.

II. GRANTING MR. DOTCH'S PETITION WOULD NOT REQUIRE THE COURT TO ADDRESS THE CONTINUED VALIDITY OF THE ALMENDAREZ-TORRES EXCEPTION.

A. The Aggravating Factors at Issue in Mr. Dotch's Case Go Beyond the Mere Fact of His Prior Conviction.

The State contends that Mr. Dotch's petition amounts to an implicit request for the Court to overturn the *Almendarez-Torres* "prior conviction" exception to *Apprendi* and *Ring*. *See* Resp't Br. at 18. A clear-eyed look at the narrow scope of the exception and the record below quickly dispels this contention.

The State maintains that the *Almendarez-Torres* exception applies to Mr. Dotch's case because both of the aggravating factors at issue "relate" or "pertain" to his prior conviction for first degree burglary. Resp't Br. at 12-21. But this Court has never held that the exception extends to facts *relating or pertaining* to a "prior conviction." Instead, the Court has repeatedly and consistently stated that the reach of the *Almendarez-Torres* exception is limited to the "fact of a prior conviction" itself. *See Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000) ("The Constitution requires that *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to the jury and proved beyond a reasonable doubt.") (emphasis added); *see also Washington v. Recuenco*, 548 U.S. 212, 212 (2005) ("other than the

fact of a prior conviction"); *United States v. Booker*, 543 U.S. 220, 220 (2005) (same); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same); *Ring v. Arizona*, 536 U.S. 584, 600 (2002) (same).

As discussed in Mr. Dotch's petition (at 3-4), the trial judge found and weighed two aggravating factors in imposing his death sentence: (1) that Mr. Dotch was under a sentence of imprisonment at the time of Ms. Taldon's death, Ala. Code § 13A-5-49(1); and (2) that Mr. Dotch had been previously convicted of a felony that involved the use or threat of violence to a person, Ala. Code § 13A-5-49(2). In finding these aggravators to exist, the trial court had to look beyond the mere "fact of the prior conviction" itself to consider subsidiary facts about the nature of the prior crime and the status of Mr. Dotch's prior sentence.

This Court's precedents establish that those subsidiary facts are within the province of the jury, not the sentencing judge. *See Shepard v. United States*, 544 U.S. 13, 25 (2005) (clarifying that the *Almendarez-Torres* exception does not allow a sentencing judge to resolve "any fact that can be described as a fact *about* a prior conviction") (emphasis added); *Apprendi*, 530 U.S. at 487 (cautioning that the *Almendarez-Torres* exception "represents at best an exceptional departure" from the Court's sentencing jurisprudence).

In short, in its effort to evade Supreme Court review, the State has mischaracterized *Almendarez-Torres* and erroneously suggested that its scope extends well beyond the fact of a prior conviction.

B. Even if *Almendarez-Torres* Were as Broad as the State Claims, It Could Not Apply in Mr. Dotch's Case in Light of the Trial Record.

Furthermore, even if the *Almendarez-Torres* exception were as broad as the State claims (and it is not), the State could not invoke the exception against Mr. Dotch in light of the record below. As set forth in the State's opposition brief (at 17), "To satisfy its burden of proving the existence of [the] two aggravating circumstances, the State introduced a certified copy of the *docket sheet* pertaining to Dotch's first-degree burglary conviction." (emphasis added). This Court has never held that a judge can rely on a docket sheet in considering sentencing enhancements relating to prior crimes, especially in a capital case.

To the contrary, in *Shepard v. United States*, 544 U.S. 13 (2005), the Court limited the "evidentiary cast" of records available to the judge to "conclusive records made or used in adjudicating [prior] guilt." *Id.* at 21. This is in keeping with the Court's "demand for certainty" regarding the factual basis for any prior guilty plea considered during sentencing. *Id.*

Accordingly, a sentencing judge may look only to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. The judge may not consider police reports (*id.* at 16), complaint applications (*id.*), or, presumably, docket sheets, all of which lack the inherent "certainty" or "conclusive significance" essential to any

application of the narrow *Almendarez-Torres* exception. *See id.* at 25.

The significance of this limitation on what the judge may rely on for this purpose is underscored by the record in Mr. Dotch's case. The docket sheet that the State offered in evidence indicates that he pled guilty to "burglary in the first degree," without reference to any particular code section under Alabama statute. (C.R. 641). As the trial court observed, the crime of burglary in the first degree under Alabama law does not necessarily involve a use or threat of violence to any person. (R. 1523-24, 1556-59).[3]

Hence, the docket sheet alone could not be relied on by the court to establish that Mr. Dotch had been previously convicted of a felony involving a "use or threat of violence to a person."[4] Nor did the State introduce a written plea agreement, transcript of plea colloquy, or any other evidence that would conclusively establish the facts to which Mr. Dotch admitted when he pled guilty to burglary. *Contrast Almendarez-Torres*, 523 U.S. 224, 226 (1998) (indicating that a transcript of the plea colloquy served as the basis for trial court's findings regarding defendant's prior conviction). Therefore, even if the State were correct that the "prior conviction" exception *could apply* in certain cases involving one or more of the aggravating circumstances at issue here, the

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[3] The abbreviation "R ___" refers to the reporter's transcript on direct appeal.

[4] In an effort to fill this "gap" in the record during sentencing, the trial court allowed the State to supplement the docket sheet exhibit with a copy of Mr. Dotch's April 22, 2004 indictment (R. 1556-59, C.R. 652). But the indictment establishes only what Mr. Dotch was accused of, not the facts to which he pled guilty.

exception *cannot apply* in this case in light of the record below.

In summary, the State's argument misconstrues both the scope of the *Almendarez-Torres* exception and its application. The exception does not apply here.[5]

III. THE STATE'S CONTENTION THAT MR. DOTCH "DID NOT CHALLENGE" THE TRIAL COURT'S FINDINGS IS A RED HERRING.

The State further contends that any constitutional error in this case would be "harmless" because Mr. Dotch "did not contest" the sentencing judge's findings with respect to the existence of the two aggravating circumstances proffered by the State. Resp't Br. at 21. This argument is a red herring for several reasons.

First, Mr. Dotch has maintained consistently since before his trial that it is a violation of the Constitution (and this Court's precedents) for Alabama judges

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[5] The continued validity of the *Almendarez-Torres* exception has long been in doubt. *See Apprendi*, 530 U.S. at 489 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided. . . ."); *see also Shepard*, 544 U.S. at 27 ("[*Almendarez-Torres*] has been eroded by this Court's subsequent Sixth Amendment jurisprudence and a majority of the Court now recognizes that [it] was wrongly decided.") (Thomas, J., concurring in part and concurring in judgment). For the reasons above, however, the State is wrong to suggest that granting Mr. Dotch's petition would oblige the Court to address this issue. The question presented is narrowly limited to whether a defendant has a constitutional right to have a jury (as opposed to a judge) determine the existence of all aggravating circumstances on which a death sentence is based.

independently to find aggravating circumstances to exist and then rely on their own findings (instead of the jury's) to impose death. *See supra* Heading I. Therefore, it is of no moment whether trial counsel specifically "challenged" or "contested" written findings made by the judge after the jury had rendered its advisory recommendation. Both before and after trial, counsel challenged whether it was constitutional for the judge to making *any such findings at all*. *See supra* Heading I.

Second, this Court has indicated that to forfeit or waive *Apprendi/Ring* rights, a defendant must either stipulate to the relevant facts or consent to judicial fact-finding. *See Blakely*, 542 U.S. at 310. Mr. Dotch did nothing of the kind. Accordingly, he preserved his "absolute entitlement" to a jury trial on all of the elements of his charge (including the two aggravating circumstances proffered by the State to render him death-eligible). *See Apprendi*, 530 U.S. at 497 ("The person who is charged with actions that expose him to the death penalty has an *absolute entitlement* to [a] jury trial on all the elements of the charge.") (emphasis added and internal referenced omitted); *Ring*, 536 U.S. at 602 ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury) (emphasis in original and internal references omitted).

Finally, even if the State's argument had some merit (and it has none), the Court's precedents make clear that now is not the time to take up questions of harmless error. This Court "ordinarily leaves it to the lower courts to pass on the harmlessness of error in the first instance." *Ring*, 536 U.S. at 609 n. 7 (internal references omitted); *see also Neder v. United*

States, 527 U.S. 1, 25 (1999) (same). Thus, consistent with the *Ring* precedent, the Court should address the merits of Mr. Dotch's petition before remanding for further proceedings not inconsistent with its opinion. *See Ring*, 536 U.S. at 609 n.7 (expressly declining to address Arizona's harmless error argument and remanding for further proceedings). *Accord Cunningham v. California*, 549 U.S. 270, 294 (2007) (overturning California's determinate sentencing law on *Apprendi* grounds and remanding for further proceedings).

CONCLUSION

For the reasons set forth above and in Mr. Dotch's petition, the writ should issue.

Respectfully submitted,

RANDALL S. SUSSKIND
EQUAL JUSTICE INITIATIVE
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

SETH A. TUCKER
Counsel of Record
JOSEPH ZAMBUTO, JR.
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
stucker@cov.com

Counsel for Petitioner

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